United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

74-1601

To be argued by
RICHARD P. LERNER

B P/S

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JACOB SUISSA,

Plaintiff-Appellant,

vs.

AMERICAN EXPORT LINES, INC. (f/k/a AMERICAN EXPORT ISBRANDTSEN LINES, INC.),

Defendant-Appellee.

BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANT-APPELLEE AMERICAN EXPORT LINES, INC.

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249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

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Defendant-Appellee.

BRIEF OF DEFENDANT-APPELLEE AMERICAN EXPORT LINES, INC.

Counterstatement of the Issues

Appellant's brief does not set forth the issues to be determined by the Court. The following issues are therefore stated by the appellee:

Issue 1. Where the admitted, uncontroverted and incontrovertible facts show that:

(a) A seaman submitted his claim for overtime through the grievance and arbitration procedures of the collective bargaining agreement;

(b) the greater part of the overtime under dispute was not payable by the clear terms of an arbitration award issued under the collective bargaining agreement; and

(c) the claim on the remaining 92 hours of overtime was settled by the company's agreeing to pay 86 hours of penalty time,

was the Court justified in granting Summary Judgment in favor of the employer steamship company?

Issue 2. Where the seaman first sought a remedy under the collective bargaining agreement and was dissatisfied with the results, may he then take a "second bite of the apple" by seeking relief under 46 U.S.C. § 596?

Issue 3. Where a seaman brings an action in a state court under 46 U.S.C. § 596, which action also raises questions under 29 U.S.C. § 185, is such an action properly removable to the Federal District Court?

Issue 4. Where a defendant makes a motion to dismiss pursuant to section 12(b), which the District Court treats as a Motion for Summary Judgment, does the failure to file a statement under Rule 9(g) of the General Rules of the United States District Court for the Southern District preclude the Court from determining the motion, where no prejudice has been shown?

Counterstatement of the Case

Appellant's brief seeks to create the impression that much of the factual background on which the Court relies consists of so-called hearsay testimony. It is respectfully submitted that the appellant's own affidavit, the collective bargaining agreement, the arbitration award and the uncontroverted facts appearing in appellee's affidavit clearly demonstrate the absence of any genuine issue on any material fact.

The above documents establish that:

(a) appellant was denied overtime by his superior (25b, 26b);

(b) the denial of overtime was proper under an uncontroverted arbitration award (16b);

(c) appellant's testimony referred the matter to his union under the grievance and arbitration procedures (26b);

(d) the matter was resolved by granting appellant 86 hours of penalty pay (14b, 27b); and

(e) no issue remained for resolution between appellant and appellee.

A. Appellant Pursued His Claim For Overtime Under The Collective Bargaining Agreement's Grievance Machinery And A Final Settlement Of His Grievance Was Reached In Accordance With Its Provisions

The defendant-appellee, American Export Lines, Inc. (appellee or AEL), a steamship company, is a party to a collective bargaining agreement ("contract") with the National Maritime Union of America, AFL-CIO (NMU). The NMU is a labor organization and duly authorized collective bargaining representative for Unlicensed Personnel employed by AEL. Plaintiff-appellant (appellant) is a member of the NMU (24b)* and as such is bound by all the terms and provisions of the contract between AEL and NMU.

As appellant's affidavit states he was employed as an electrician aboard voyage 138 of AEL's vessel SS Exford for a foreign voyage commencing October 3, 1972 (24b).

As appellant's affidavit further states, his Department Head, the Chief Engineer, Mr. Eisner, refused to authorize overtime work to which he felt he was entitled (24b, 25b). The collective bargaining agreement specifically requires express authorization of such overtime (15b). Thereafter, he submitted claims for overtime and penalty time —which he admits he never worked and were not authorized

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* b refers to appellee's Supplemental Appendix followed by the page number thereof.

(24b, 25b). These claims were rejected by his Department Head (24b, 25b).

It is not disputed that appellant was authorized to work, did work and was paid for 37 hours of overtime and 5 hours of penalty time during the voyage (20b, 21b).[1]

As appellant's affidavit further states, during the course of the voyage and at its conclusion on February 13, 1973, he immediately submitted his grievance on the overtime claim to his union (26b).

It is not disputed that at the conclusion of the voyage, in accordance with the grievance machinery provisions of the collective bargaining agreement between AEL and the NMU—Article I, Section 4(b) 2. (14b)—his overtime grievance was immediately pursued by his local union representative, NMU Patrolman LaForgia with AEL's local representative, Payroll Master Nehrbauer (7b, 26b). It is also not in dispute that these two gentlemen reached an understanding that the grievance would be adjusted by paying appellant 50 hours at the penalty time rate, and that as permited under section 4(b) 2. of the grievance procedures (14b), Mr. LaForgia reserved the right to refer the grievance adjustment to the NMU National Office for review (7b, 14b).

As appellant further states in his affidavit, the matter was referred to Mr. Baresic, the NMU Vice President In Charge Of Contract Enforcement (26b). It is not disputed that on February 14, 1973, Mr. Baresic contacted AEL's Manager of Operations, Captain Shivers, informing him that the adjustment was not acceptable to the NMU (8b).

Discussions ensued and Mr. Baresic and Captain Shivers agreed to settle the grievance for 86 hours penalty time

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[1] The authorization for work and payment is witnessed by the signatures contained in the left hand corner of the 2 pages of Individual Statement of Crew Overtime forms (20b, 21b).

(8b). That that settlement was a "final settlement" of appellant's grievance in accordance with the AEL-NMU contract is incontestable in that Article I, Section 4(b) 2. provides in its pertinent part that:

> "The Company reserves the right, where necessary, to refer a dispute to its head office for *final settlement.* Similarly, the Union reserves the right, where necessary, to refer a dispute to its National Office for disposition with the head office of the Company." (14b) (emphasis added)

Appellant states that he takes issue with appellee's contention that the issue of overtime was settled. However, the contract and appellant's own statement conclusively establish that it was settled.

Firstly, under the contract's grievance procedure Section 4(b)4., if any grievance or dispute is not adjusted and settled, the union may within thirty days of the time a grievance has been denied under Section 4(b) (2) submit the matter to arbitration (15b). No such submission was ever made by the NMU because it had settled the grievance.

Secondly, and more importantly, appellant recognized the fact that he had exhausted his contractual remedies and that his grievance had been settled when he sent a letter to the NMU which stated:

> "Therefore, I want the record to show that all remedies have been exhausted under the Collective Bargaining Agreement (NMU) as to arbitration or any other out-of-court disposition of my claims. I am presently entitled to commence an independent lawsuit against American Export Isbrandtsen Lines, Inc." (27b).

Clearly, AEL and the NMU had reached a "final settlement" of appellant's claim for overtime.

B. The Provisions Of The Contract Under Which Appellant Grieved For Overtime Had Already Been Interpreted By An Arbitrator, Which Interpretation Was Diametrically Opposed To Appellant's Position

Appellant's claim for overtime was based upon Article V, Section 25(d) of the AEL-NMU contract which provides:[2]

> "When an Electrician is required to be aboard the vessel while it is in port and working cargo whether or not he is actually working, he shall receive overtime for all hours that he is required to be aboard other than his regular hours." (15b)

Appellant claimed that an Electrician must stand by at all times when a vessel works cargo in port after regular hours and that express overtime authorization under Article II, Section 4 of the contract (15b) is not required. *This same exact position was taken by the NMU during the arbitration and was rejected by Mr. Kheel* (16b-19b).

Appellant claimed that an Electrician must standby at all times when a vessel works cargo in port after regular hours and that express overtime authorization under Article II, Section 4 of the contract (15b) is not required. *This same exact position was taken by the NMU during the arbitration and was rejected by Mr. Kheel* (16b-19b).

AEL at the arbitration contended that under Section 25(d) (*supra*) it was up to the Chief Engineer to decide when it was necessary for the Electrician to stand by and accordingly express overtime authorization was required in accordance with Article II, Section 4 (15b, 16b-19b).

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[2] Appellant in his affidavit deleted the word "When" which is the first word of Section 25(d) (15b).

Mr. Kheel upheld AEL's interpretation of Article V, Section 25(d) (*supra*), holding:

> ". . . I do not believe, in the absence of more compelling evidence of a clear past practice to have electricians standby at all times, that I can rule that the contract requires continuous standing by while winches are being worked." (18b-19b)

Indeed, in light of the award, appellant's grievance could rightfully be described as frivolous. In spite of the frivolous nature of appellant's grievance, it was fully pursued and settled in good faith by the NMU.

That appellant's grievance was settled in good faith is conclusively established by an application of the arbitration award to his actual claim.

Over four-fifths of appellant's overtime claim—361.5 hours of "cargo time" (25b)—was, as he states, made under Article V, Section 25(d) of the contract (24b, 25b). The arbitration award rendered by Mr. Kheel fully disposed of that claim. He was not entitled to be paid for those hours, and it was so recognized by the NMU.

Thus, as is established by appellant's affidavit (25b, 26b), there was only a total of 92 hours of overtime and penalty time which could be considered in dispute, and that claim was settled by agreeing to pay 86 hours of penalty time.

Thus, no genuine issue as to any material fact exists on this record. Appellant's grievance was processed in accordance with the contract's grievance machinery and resulted in a good faith, final settlement which, under the given facts, must be considered highly favorable to appellant.

C. Subsequent Proceedings

Although notified that a check in the amount of settlement was available at AEL's office, appellant did not ap-

pear. Instead, he commenced the instant action in the Civil Court, New York County.

Appellee removed the action to the United States District Court for the Southern District and moved, among other things, to dismiss the complaint pursuant to Federal Rule 12(b)(6):

> ". . . on the ground that plaintiff has failed to state a claim upon which relief can be granted in that a final and binding settlement of plaintiff's claim for overtime . . ."

had been made in accordance with the grievance machinery contained in the AEL-NMU contract (2b).

The Court granted appellee's motion holding that the resolution of appellant's grievance under the contract precluded his pressing the same claim under 46 USC § 596.

Appellant now appeals from the order entered.

ARGUMENT

I

Appellant having elected to exercise his contractual remedies, his subsequent action, pursuant to 46 USC § 596, is barred by the final settlement of his claim for overtime reached in accordance with the grievance machinery provisions of the collective bargaining agreement between defendant and the NMU-appellant's duly authorized and certified collective bargaining representative.

A. The Settlement Of Appellant's Grievance In Accordance With The Provisions Of The Contract Is Final And Binding Upon Him.

Congress has declared that the National Labor Policy favors full utilization of the grievance machinery to settle grievances short of arbitration. This National Labor Policy

was given full recognition by the Supreme Court of the United States in *Vaca* v. *Sipes,* 386 U.S. 171, 191 (1967), where the court stated that:

> "In LMRA § 203 (d), 61 Stat. 154, 29 USC § 173 (d), *Congress declared that 'Final adjustment by a method agreed upon by the parties is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement'.* In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplated that each will endeavor in good faith to settle grievances short of arbitration. *Through this settlement process, frivolous grievances are ended prior to the most costly and time consuming steps in the grievance procedure.*" (Emphasis added)

At the time of this statement, it was already well settled law that an individual employee's action against an employer must be dismissed when the claim has been settled in accordance with the grievance machinery of the contract between the defendant company and the plaintiff's collective bargaining representative. This principle was established in *Union News Company* v. *Hildreth,* 295 F 2d 658 (CA6, 1961), 315 F 2d 548 (CA6, 1963), cert. den. 375 US 826 (1963).

The grievance machinery in *Hildreth* (295 F. 2d 658 at 660), is substantially similar to that found in the AEL-NMU contract (13b-15b). The matter is first handled at the local level by the union and company's unit manager. If not resolved it is referred to the company's home ("head") office for settlement. If the union and the company's home office cannot reach a satisfactory adjustment ("final settlement") then the matter is sent to arbitration.

Pursuant to this procedure the defendant and plaintiff's union agreed to a layoff of and permanent replacements for

plaintiff and four other employees. This agreement was reached—as in the instant matter—without resort to the last step of the grievance machinery, i.e., arbitration.

When plaintiff was permanently replaced, she pressed her union for action. The union told her that they were convinced her discharge was for just cause and they did not present a grievance to the company on her behalf.

The plaintiff sued the company for breach of contract and obtained a judgment in the District Court. The Court of Appeals in reversing and ordering a new trial[3] enunciated the criteria to be utilized in determining the finality of settlements of grievances by a union and employer prior to arbitration holding that:

> "The question, then, for decision is whether such statutory power [29 U.S.C.A. § 159 (a)] in combination with the terms of the bargaining contract, authorized the Union and defendant to mutually conclude, as a part of the bargaining process, that the circumstances shown by the evidence provided just cause for the lay-off and discharge of plaintiff and other of defendant's employees. We conclude that it did. Unless such bilateral decisions, made in good faith, and after unhurried consideration between a Union and an employer, be sustained in court the bargaining process is a mirage without the efficacy contemplated by the philosophy of the law which makes its use compulsory." (295 F. 2d 658 at 664)

The Court examined the specific terms of the contract. It determined that the intent of the parties was to give the parties the authority to enter into an agreement such as that

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[3] On the new trial, the District Court relying on the ruling of the Court of Appeals entered a directed verdict for the company. This verdict was affirmed in 315 F. 2d 548 (CA6, 1963), cert. den. 375 US 826 (1963).

reached here. It further held that the union's:

> ". . . exercise of discretion and interpretation of contract terms in the interest of all its members is . . . subject to challenge after exhaustion of the grievance procedure only on grounds of bad faith, arbitrary action or fraud." (295 F. 2d 658 at 666)[4]

The Court concluded its opinion by stating (295 F. 2d 658 at 667)[5] that:

> "Under the philosophy of collective responsibility an employer who bargains in good faith should be entitled to rely upon the promises and agreements of the Union representatives with whom he must deal under the compulsion of law and contract. The collective bargaining process should be carried on between parties who can mutually respect and rely upon the authority of each other."

As the United States Supreme Court stated in *General Drivers, Warehousemen and Helpers, Local Union No. 89* v. *Riss and Company, Inc.*, 372 US 517 at 519 (1963):

> ". . . if the award at bar is the parties' chosen instrument for the definitive settlement of grievances under the Agreement, it is enforceable under § 301. And if the Joint Area Cartage Committee award is thus enforceable, it is of course not open to the courts to reweigh the merits of the grievance. American Mfg. Co., supra (363 US at 567, 568)."

Applying the principles established in *Riss* and *Hildreth, supra,* to the instant matter, then the settlement between

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[4] See also *Vaca* v. *Sipes*, 386 US 171 at 190 (1967).

[5] See also *Simmons* v. *Union News Co.*, 341 F 2d 531 (CA6 1965), cert. den. 382 U.S. 884 (1965)—a companion case enunciating the same principles.

the NMU's National Office and the Company's head office is a complete bar to the instant complaint.[6]

That the NMU handled appellant's grievance in good faith—on the basis of the Kheel arbitration award (16b)—is beyond dispute. The provision of the contract under which appellant grieved for substantially all of his overtime had already been interpreted by that arbitrator, which interpretation was diametrically opposed to appellant's position. Nevertheless, the Union processed his claim to a step in the grievance machinery which the parties expressly stated was to "be used sparingly" (14b) in reaching a "final settlement", and was successful in negotiating a settlement favorable to appellant.

The instant matter falls squarely within the principles laid down in *Hildreth* and *Riss, supra.* Accordingly, the "final settlement" of appellant's claim should be enforced by this Court.

B. Appellant Elected To Utilize The Contract's Grievance Machinery To Resolve His Claim For Overtime. Accordingly, He Is Barred From Seeking Relief Under 46 USC § 596.

Appellant elected to pursue his claim for overtime under the AEL-NMU contract and that claim was resolved and settled in accordance with the contract's grievance machinery. Having made that election, his reliance on *U. S.*

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[6] See also *Harris* v. *Chemical Leaman Tank Lines, Inc.*, 437 F 2d 167 at 171 (CA5, 1971) in which the Court citing *Vaca* v. *Sipes* and the *Hildreth* and *Simmons* cases, *supra,* stated:

"Thus . . . *the union has the power* to sift out frivolous grievances, . . . and *to settle disputes with the employer short of arbitration.*" (emphasis supplied).

Also see *Haynes* v. *United States Pipe and Foundry Company* 362 F 2d 414 (CA5, 1966) in which the Court upheld the settlement of a grievance although the contract contained no arbitration provision; the last step being the union's right to strike.

Bulk Carriers v. *Arguelles*, 400 U. S. 351 (1971), as providing him a right to subsequently sue under 46 U.S.C. 596, is misplaced.

As Judge Ward stated in his Memorandum Decision dismissing the complaint:

> "The United States Supreme Court, in *Arguelles, supra,* held that the fact that a seaman's terms of employment were governed by a collective bargaining agreement did not preclude his pursuit of the statutory remedy under 46 U.S.C. § 596 even though he had not submitted his claim to the grievance procedure established in the collective bargaining agreement. In so holding, the Court carved out a narrow exception to the principle of *Republic Steel* v. *Maddox*, 379 U.S. 650 (1965), that before an employee can resort to the courts to enforce individual rights under a collective bargaining agreement he must first exhaust the grievance procedure provided in that agreement." (4a-5a)[7] (Emphasis supplied)

That the Supreme Court in *Arguelles, supra,* provided a seaman only a choice of remedies and not the right or opportunity to pursue his claim in two different forums is clear from the following:

> "We do not hold that § 596 is the exclusive remedy of the seaman. He may, if he chooses use the processes of grievance and arbitration." (400 U.S. 351 at 356)
>
> * * * * * *
>
> "Since the history of § 301 is silent on the abrogation of existing statutory remedies of seamen in the maritime field, *we construe it to provide only an optional remedy to them.*" (Id. at 357) (Emphasis supplied)

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[7] Judge Ward's Memorandum Decision is contained in appellant's Appendix pages 3a-7a.

Justice Harlan, in his concurring opinion, made it clear that the Supreme Court did not intend a seaman to have "two bites of the apple" when he stated:

> "[T]he very essence of the legislative policy at stake here is ensuring promptness in the payment of wages . . . *In this circumstance, I think conflicting congressional policies are best reconciled by construing 46 U.S.C. § 596 and § 301 of the Labor Management Relations Act as securing to the seaman an option to choose between arbitral and judicial forums where he states a claim under both the contract and 46 U.S.C. § 596.*" (400 U.S. 351 at 366) (Emphasis supplied)

As Judge Ward held in his Memorandum Decision:[8]

> "To permit a seaman who has chosen the route of the grievance procedure to satisfy a claim for wages, pursued it through several stages, and *been dissatisfied* with the results, then to sue in federal court on his separate statutory right under 46 U.S.C. § 596, would undercut the principles of finality and conclusiveness enunciated in *Maddox, supra,* and *Vaca, supra.*" (Emphasis supplied)

The United States Court of Appeals for the Third Circuit has already recognized the principle that a seaman's initial resort to the grievance procedure precludes his subsequently suing under 46 U.S.C. § 596 when it stated in *Cady* v. *Twin Rivers Towing Company,* 486 F. 2d 1335 (1973) at 1338-39:

> "Even were we to sanction Cady's right as a seaman, to bring his claim to court prior to submitting it to the contract grievance machinery, we are faced with the fact that Cady had already invoked the grievance procedures. As noted above, in these circum-

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[8] Appellant's Appendix, page 6a.

stances the courts are unwilling to recognize such claims absent allegations that the grievance machinery proved inadequate to settle the claim. Neither *Arguelles,* which concerned a seaman who did not pursue the contract grievance procedure, nor any other case cited by Cady is to the contrary."

Appellant, herein, has had his day in Court. The finality of the settlement between his Union and defendant should be upheld.

It is respectfully requested that Judge Ward's dismissal of the complaint on the ground that:

". . . plaintiff's initial resort to the grievance procedure for resolution of his wage dispute precludes his now pressing a claim in this forum under 46 U.S.C. § 596."[9]

be affirmed.

II

An action brought by a seaman in a State Court under 46 U.S.C. § 596, which action also raises question under 29 U.S.C. § 185, is removable to the Federal District Court.

Appellant commenced this action in the Civil Court, New York County pursuant to 46 U.S.C. § 596. The complaint also raised issues under 29 U.S.C. § 185. Appellee removed the action to the United States District for the Southern District of New York. That removal was proper is beyond dispute.

28 U.S.C. § 1441, provides that actions brought in a State Court, of which the United States District Courts have original jurisdiction, are removable thereto.

28 U.S.C. § 1333 provides that the district courts have original jurisdiction over admiralty or maritime civil cases.

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[9] Appellant's Appendix, page 7a.

That an action brought pursuant to 46 U.S.C. § 596 is an admiralty or maritime case is not open to question.[10]

Furthermore, 29 U.S.C. § 185 provides that suits for violations of collective bargaining agreements may be brought in any United States District Court having jurisdiction of the parties. That an individual employee may bring an action for breach of a collective bargaining agreement, under 28 U.S.C. § 185(a), also is not open to question.[11]

Thus it matters not whether appellant's action is treated as one brought pursuant to 46 U.S.C. § 596 or 28 U.S.C. § 185(a). In either instance jurisdiction resides in the Federal Courts and removal thereto was proper.

Appellant's claim that the action should have been remanded is totally without merit.

III

The filing of a 9(g) statement, when a motion to dismiss pursuant to Federal Rule 12(b) is made, is not required.

Appellee moved to dismiss the complaint under Federal Rule 12(b) ("Rules" or "Rule"), not for Summary Judgment pursuant to Rule 56. The General Rules of District Court For The Southern District require 9(g) Statements only in the latter instance. It must be assumed that had the District Court deemed 9(g) Statements to be required in the former instance, it would have so expressly provided.

Assuming, arguendo, that a 9(g) Statement might be necessary when a motion pursuant to Rule 12(b)(6) is made, appellant was not prejudiced by its absence. A mere

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[10] *U.S. Bulk Carriers, Inc.* v. *Arguelles*, 400 U.S. 351 (1970).

[11] *Smith* v. *Evening News Association*, 371 U.S. 195 (1962); *Vaca* v. *Sipes*, 386 U.S. 171 (1967).

assertion of prejudice contained in an appellant's brief (p. 5) is not sufficient to establish that prejudice has occurred where his own affidavit established the absence of genuine issues.

Furthermore, unlike General Rule 9(b) which provides that failure to comply with its provisions is grounds for the Court to deny or grant a motion, General Rule 9(g) contains no such provision. Thus it must be assumed that the District Court could and did, in its discretion, determine that the failure by appellant and appellee, to file a 9(g) Statement was of no consequence.

Conclusion

Appellant has had his day in court. He chose to utilize the grievance machinery provisions of the AEL-NMU contract which election resulted in a resolution of his overtime claim. It is respectfully submitted that that election, under the National Labor Policy and case law, precludes his now resorting to the courts under 46 U.S.C. § 596 concerning the same claim.

Wherefore, it is respectfully requested that the District Court's dismissal of the complaint be affirmed.

Respectfully submitted,

LORENZ, FINN, GIARDINO & LAMBOS
Attorneys for Appellee
American Export Lines, Inc.
25 Broadway
New York, New York 10004
943-2470

Dated: November 1, 1974.

Of Counsel:

C. P. LAMBOS
R. P. LERNER

Notice of Motion to Dismiss Complaint.

PLEASE TAKE NOTICE that upon the annexed motion, affidavit of Albert G. Fialcowitz, sworn to on the 24th day of April, 1973, and upon the pleadings and proceedings heretofore had herein, the undersigned will move this Court at the U. S. Courthouse, Foley Square, Borough of Manhattan, City and State of New York, on the 5th day of June, 1973, at 2:15 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard for an Order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure dismissing the plaintiff's Summons and Indorsed Complaint or in the alternative, for an order compelling the plaintiff to exhaust his administrative remedies under the grievance procedure in the Collective Bargaining Agreements between American Export Lines, Inc. and the National Maritime Union of America, AFL-CIO, the duly authorized bargaining representative of the plaintiff.

Dated: April 25, 1973, New York, New York.

To: KLEIN, COHEN AND SCHWARTZENBERG
Attorneys for Plaintiff

LORENZ, FINN, GIARDINO & LAMBOS
Attorneys for Defendant

Motion to Dismiss Complaint.

The defendant, American Export Lines, Inc. moves this Court as follows:

1. To dismiss the Summons and Indorsed Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on the ground that the plaintiff has failed to state a claim upon which relief can be granted in that a final and binding settlement of plaintiff's claim for overtime has been made in accordance with the grievance machinery procedures set forth in the Collective Bargaining Agreement between American Export Lines, Inc. and The National Maritime Union of America, AFL-CIO, plaintiff's duly authorized and certified collective bargaining representative; or, in the alternative,

2. To stay the proceedings pending plaintiff's exhausting his administrative remedies under the grievance and arbitration procedure as set forth in the Collective Bargaining Agreement as amended, between American Export Lines, Inc. and the National Maritime Union of America, AFL-CIO.

Dated: New York, New York, April 25, 1973.

LORENZ, FINN, GIARDINO & LAMBOS
Attorneys for Defendant

To: KLEIN, COHEN AND SCHWARTZENBERG
Attorneys for Plaintiff

Affidavit of Albert G. Fialcowitz, in Support of Motion.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ALBERT G. FIALCOWITZ, being duly sworn, deposes and says:

(1) I am the Director of Labor Relations for American Export Lines, Inc. (hereinafter referred to as "AEL") in the above-entitled action.

(2) This affidavit is submitted in support of defendant's motion to:

(a) Dismiss the Summons and Indorsed Complaint (attached hereto as "Exhibit A") on the ground that plaintiff, Jacob Suissa, has failed to state a claim upon which relief can be granted in that a final and binding settlement of his claim for overtime wages has been made in accordance with the grievance machinery procedures set forth in the Collective Bargaining Agreement between AEL and the National Maritime Union of America, AFL-CIO (hereinafter referred to as "NMU") plaintiff's duly authorized and certified collective bargaining representative; or, in the alternative,

(b) To stay the proceedings pending plaintiff's exhausting his administrative remedies under the grievance and arbitration procedure set forth in the Collective Bargaining Agreement between AEL and the NMU.

(3) On or about the 22nd day of March, 1973 an action was commenced in the Civil Court of the City of New York, State of New York, County of New York, entitled "Jacob Suissa, Plaintiff, against American Export Lines, Inc.

(f/k/a American Export Isbrandtsen Lines, Inc., Defendant"), Index No. 38956/1973, by the service upon defendant AEL of a Summons and Indorsed Complaint (Exhibit A).

(4) This action was removed by defendant, AEL, to this Court by the filing of a Notice and Petition for Removal with sufficient bond and supporting affidavit on April 20, 1973. As the Indorsed Complaint makes clear, the plaintiff's action is for overtime wages, in the sum of $3,384.82, alleged to be due him under the collective bargaining agreement (contract) between NMU and AEL.

(5) Plaintiff is a member of the NMU which represents all Unlicensed Personnel aboard defendant's vessels. Accordingly, he is bound by all of the terms and provisions of the contract (attached hereto as Exhibit B) between the NMU and AEL.

(6) As the facts hereinafter set forth establish, a "final settlement" of plaintiff's claim was made between the NMU and AEL in accordance with the binding grievance machinery of the contract which provides in its pertinent part as follows:

> "If the grievance cannot be resolved under the provisions of paragraph (a) of this Section, the decision of the Master shall govern at sea and in foreign ports, and until the vessel arrives at a port where the Company maintains an operating office and the Union maintains an office. The dispute shall then be referred to a representative of the Union who, if he believes it has merit, shall attempt to resolve it with the local representative of the Company. The Company reserves the right, where necessary, to refer a dispute to its head office for final settlement. Similarly, the

Union reserves the right, where necessary, to refer a dispute to its National Office for disposition with the head office of the Company. It is understood, however, that this right will be used sparingly and that both Parties will make every effort to settle disputes in the port where they arise." (Ex. B, Art. I, Section 4(b) 2. p. 14)

(7) Plaintiff's claim arises out of his employment as an Electrician, aboard voyage 138 of defendant's vessel S.S. EXFORD, for the period October 3, 1972 to February 13, 1973.

(8) During the voyage, plaintiff turned in claims for overtime and penalty time which were rejected by his Department Head, the Chief Engineer, Mr. Eisner, since *the overtime had not been authorized as required* by Article II, Section 4, of the collective bargaining agreement which provides:

"Authorization For Overtime Work. Overtime or penalty time shall in no case be worked without the prior authorization of the Master or person acting by authority of the Master." (Ex. B, p. 85)

A Department Head is considered a "person acting by authority of the Master."

(9) Plaintiff's claims for overtime, the subject matter of his grievance subsequently settled by NMU and AEL, were based upon his interpretation of Article V, Section 25(d) of the contract which provides:

"When an Electrician is required to be aboard the vessel while it is in port and working cargo whether or not he is actually working, he shall receive overtime for all hours that he is required to be aboard other than his regular hours." (Ex. B, p. 122)

(10) *It is important to note that, in an arbitration between the NMU and AEL, Theodore W. Kheel rendered an interpretation of Section 25(d) which is diametrically opposite to the position urged by plaintiff as the basis of his grievance.* (Exhibit C OPINION AND AWARD of Theodore W. Kheel dated August 26, 1971)

(11) Plaintiff claims, as did the Union during the arbitration, that an Electrician must standby at all times when a vessel is in port working cargo after regular work hours and that express overtime authorization pursuant to Article II, Section 4 (Ex. B, p. 85) was not required.

(12) AEL contended that it was up to the Chief Engineer to decide when it was necessary for the Electrician to standby when a vessel was in port working cargo after the Electrician's regular hours and accordingly express overtime authorization was required in accordance with Article II, Section 4. (Ex. B, p. 85)

(1) Mr. Kheel, in his OPINION AND AWARD, upheld AEL's interpretation of Article V, Section 25(d) (paragraph 9, *supra*) holding:

> ". . . I do not believe, in the absence of more compelling evidence of a clear past practice to have electricians stand by at all times, that I can rule that the contract requires continuous standing by while winches are being worked." (Ex. C, p. 4)

(14) At the conclusion of the voyage—February 13, 1973—in addition to his regular wages received 37 hours overtime and 5 hours penalty time *which had been authorized* as is witnessed by the signatures of the Master of the Vessel, Mr. Henriques, and/or plaintiff's Department head, Mr. Eisner, whose signatures appear at the

bottom left hand corner of Exhibit D (2 pages) attached hereto.

(15) Additionally, at the conclusion of the voyage, plaintiff continued his claim for overtime and penalty time (364½ hours and 1 hour respectively) which had not been authorized. (His claim for overtime and for penalty time is contained in Exhibit E (4 pages) attached hereto.) That this overtime was not authorized is witnessed by the absence of any signatures at the left hand corner of each page and the entry "Disputed Overtime" found in the top section of the 4th column of each page.

(16) At the time of the vessel's payoff on February 13, 1973, plaintiff submitted a grievance for the overtime to his local union representative, NMU Patrolman Mr. LaForgia.

(17) In accordance with the grievance procedure set forth in Article I, Section 4(b)2. of the contract (Ex. B, p. 14—set forth in full in paragraph 6, *supra*), Mr. LaForgia immediately took up the grievance with AEL's local representative Mr. Nehrbauer—the Payroll Master.

(18) Mr. LaForgia and Mr. Nehrbauer reached an understanding that the grievance would be adjusted by paying plaintiff 50 hours at the penalty time rate.

(19) The NMU Patrolman, however, reserved the right to refer the grievance adjustment to the NMU's National Office for review.

(20) On February 14, 1973, Mr. Baresic, the NMU Vice President In Charge of Contract Enforcement contacted Captain Shivers—AEL's Manager of Operations.

(21) Mr. Baresic informed Captain Shivers that he had reviewed the grievance adjustment agreed upon by the Union's and Company's local representatives and that the adjustment was not acceptable to the NMU's National Office.

(22) Mr. Baresic and Captain Shivers discussed the claim and agreed the grievance be settled by a payment, to plaintiff, of 86 hours penalty time. The plaintiff and the NMU were immediately notified that the check in settlement of the grievance was at AEL's Payroll Office.

(23) That plaintiff is bound by the provisions of the contract and that the settlement of the plaintiff's grievance was a "final settlement" is indisputable.

(24) Article I, Sec. 4(b) 2. of the contract expressly authorizes a "final settlement" of grievances by the National Office of the Union and the head office of the Company by providing in its pertinent part that:

> "The Company reserves the right, where necessary, to refer a dispute to its head office for final settlement. Similarly, the Union reserves the right, where necessary, to refer a dispute to its National Office for disposition with the head office of the Company." (Ex. B, p. 14)

(25) The facts clearly establish that plaintiff's grievance was handled in accordance with the grievance machinery and finally settled in accordance with the language quoted in paragraph (24) above.

(26) Plaintiff's grievance having been finally settled in accordance with the contract's grievance machinery, it is respectfully submitted his action should be dismissed.

(27) If this action is not dismissed the efficacy of the contract's grievance machinery, and the contract itself, would be destroyed. AEL, and all other companies who have entered into the instant contract with the NMU, would be open to numerous law suits concerning matters which have been finally resolved, in good faith, by the parties to the collective bargaining agreement. Such a result would be contrary to the national labor policy and would be destructive of labor relations in the shipping industry and other industries as well.

(28) Should this Court determine no "final settlement" of plaintiff's grievance was reached, it is respectfully submitted that plaintiff having failed to exhaust his administrative remedies under the contract the action should be stayed pending arbitration of his grievance.

(29) The contract provides for arbitration in the event that:

> ". . . any dispute or grievance arising under the terms of the agreement is not adjusted and settled in the manner hereinbefore provided . . ." (Ex. B, p. 15)

(30) Clearly plaintiff is bound by the contract's grievance and arbitration machinery. To permit him to proceed with this action without having exhausted his contractual administrative remedies would undermine the arbitration provision of the contract which is so very necessary to labor peace and harmony in this industry.

IT IS RESPECTFULLY REQUESTED THAT:

(a) The plaintiff's action be dismissed for failure to state a claim upon which relief can be granted in that a final and binding settlement of his grievance for overtime has been made in accordance with

the grievance machinery provisions of the contract between defendant and the NMU—plaintiff's authorized and certified collective bargaining representative; or, in the alternative,

(b) This proceeding be stayed and that plaintiff be ordered to exhaust his administrative remedies under the grievance and arbitration provisions of the contract.

(Sworn to by Albert G. Fialcowitz, April 24, 1973.)

Exhibit A, Summons, Annexed to Foregoing Affidavit.

CIVIL COURT OF THE CITY OF NEW YORK,

COUNTY OF NEW YORK.

[SAME TITLE]

Plaintiff's Residence
25 West 64th Street
New York, New York 10023

The basis of the venue designated is:

Residence of parties

To the above named defendant(s)

You are hereby summoned to appear in the Civil Court of the City of New York, County of New York at the office of the Clerk of the said Court at 111 Centre Street, New York, New York, in the County of New York, City and State of New York, within the time provided by law as noted below and to file your answer to the complaint with the Clerk: upon your failure to answer judgment will be taken against you for the sum of $3,384.82* with interest thereon from the 13th day of February, 1973 together with the costs of this action.

Dated, the 19th day of March, 1973.

KLEIN, COHEN & SCHWARTZENBERG
Attorney(s) for Plaintiff

* Plus penalties and attorneys' fees.

Exhibit A, Summons, Annexed to Foregoing Affidavit.

INDORSED COMPLAINT

A statement of the nature and substance of the plaintiff's cause of action is as follows:

Plaintiff was employed as an electrician by defendant aboard its vessel, SS EXFORD, from October 3, 1972 to February 13, 1973, and did become entitled to certain overtime wages in the sum of $3,384.82, no part of which has been paid, although duly demanded.

Because of defendant's wrongful refusal or neglect to pay the foregoing without sufficient cause, plaintiff also claims statutory penalties pursuant to R.S. 4529 (46 U.S.C. 596) and attorneys' fees.

WHEREFORE, plaintiff demands judgment against defendant in the sum of $3,384.82, together with penalties, attorneys' fees, interest, costs and disbursements.

KLEIN, COHEN & SCHWARTZENBERG
Attorney(s) for Plaintiff

Exhibit B, Annexed to Foregoing Affidavit.

COLLECTIVE BARGAINING AGREEMENT BETWEEN AMERICAN EXPORT LINES, INC., AND NATIONAL MARITIME UNION OF AMERICA, AFL-CIO

* * * * *

[Exhibit B, Page 13]

Article 1, Section 4. Grievance and Arbitration Procedure. (a) Department Spokesmen. The Unlicensed Personnel of each department employed on board vessels operated by the Company shall have the right to designate a spokesman by and from that department. Where the Unlicensed Personnel so desire, an additional spokesman may be designated as ship's chairman. The Company shall recognize the spokesman so designated as the representatives of the Unlicensed Personnel for the purpose of adjusting grievances during the course of a voyage.

(b) Grievance Machinery. A dispute or grievance arising in connection with the terms and provisions of this Agreement shall be adjusted in accordance with the following procedure:

1. Any employee who feels that he has been unjustly treated or been subjected to an unfair consideration shall

[Exhibit B, page 14]

endeavor to have said grievance adjusted by the designated representatives of the Unlicensed Personnel aboard the vessel in the following manner:

(i) Presentation of the complaint to his immediate superior.

(ii) Appeal to the head of the department in which the employee involved shall be employed.

(iii) Appeal directly to the Master.

Exhibit B, Annexed to Foregoing Affidavit.

2. If the grievance cannot be resolved under the provisions of paragraph (a) of this Section, the decision of the Master shall govern at sea and in foreign ports, and until the vessel arrives at a port where the Company maintains an operating office and the Union maintains an office. The dispute, shall then be referred to a representative of the Union who, if he believes it has merit, shall attempt to resolve it with the local representative of the Company. The Company reserves the right, where necessary, to refer a dispute to its head office for final settlement. Similarly, the Union reserves the right, where necessary, to refer a dispute to its National Office for disposition with the head office of the Company. It is understood, however, that this right will be used sparingly and that both Parties will make every effort to settle disputes in the port where they arise.

3. If an employee is unable to pursue the provisions set forth in paragraph (a) of this Section because he is no longer employed aboard the vessel, he may present his grievance to a Union representative in any Union port office who may then pursue the procedure set forth in paragraph (b) of this Section. Unless extenuating circumstances exist, all grievances shall be presented no later than thirty (30) days after the ship pays off.

4. In the event the Company alleges that there has been a violation of any of the provisions of this Agreement, it shall

[Exhibit B, page 15]

within thirty (30) days of the alleged violation or within thirty (30) days after the first pay-off following the alleged violation, whichever occurs sooner, advise the Union in writing of the facts concerning the violation, the specific Sections of the Agreement violated, and the relief sought.

Exhibit B Annexed to Foregoing Affidavit.

The Union shall respond in writing to the head office of the Company within fifteen (15) days of the receipt of the Company's grievance, following which the Company and the Union will meet and endeavor to resolve the grievance.

(c) Arbitration Procedure. If any dispute or grievance arising under the terms of this Agreement is not adjusted and settled in the manner hereinbefore provided, same may be submitted, by the Union or the Company as the case may be, within thirty (30) days from the time grievance has been finally denied under Section 2(b), (c) or (d) of this Article to a Board of Arbitration . . .

* * * * *

[Exhibit B, Page 85]

Article II, Section 4. Authorization for Overtime Work. Overtime or penalty time shall in no case be worked without the prior authorization of the Master or person acting by authority of the Master.

* * * * *

[Exhibit B, Page 122]

Article V, Section 25 (d) When an Electrician is required to be aboard the vessel while it is in port and working cargo whether or not he is actually working, he shall receive overtime for all hours that he is required to be aboard other than his regular hours.

Exhibit C, Opinion and Award, Annexed to Foregoing Affidavit.

In the Matter of the Arbitration

between

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO

and

AMERICAN EXPORT ISBRANDTSEN LINES, INC.

APPEARANCES:

For the Union
Abraham E. Freedman

By: Mr. Ned R. Phillips
Mr. T. J. Walker
Mr. Joseph Labaczewski

For the Company
Lorenz, Finn, Giardino & Lambos

By: Mr. C. P. Lambos
Mr. Richard P. Lerner
Mr. Albert G. Fialcowitz

The basic issue is whether the Company violates the contract if it fails to have an electrician stand by at all times when cargo winches are being worked in port. The Company claims that it is up to the Chief Engineer to decide whether or not to have electricians stand by after their workday of 8:00 a.m. to 5:00 p.m. is completed. The Union maintains that an electrician must stand by at all times since the duties of the electrician encompass "main-

tenance and repair work on all electrical equipment and machinery." If no electrician is standing by, then the engineers are invading the work of the electricians, according to the Union, because jurisdiction must be protected by employees who are knowledgeable, responsible and available.

In response, the Company contends that the Union's argument would require stand-by electricians for every piece of electrical equipment, not merely the winches, since breakdowns might also occur with such equipment after the electricians' regular hours. It also points out that if a breakdown occurs, it can use other winches if they are available, call out an electrician on board and pay him overtime, make a "reasonable" effort to obtain a replacement for any electrician who may not be aboard, call the Union hall for a replacement, or allow the winch to remain unrepaired until the following day. It is extremely rare, according to the Company, when a winch cannot be left unrepaired until the next day.

Article I, Section 36 (a), of the contract appears to allow the Company to use other than unlicensed personnel for work in port providing a "reasonable" effort is made to obtain a replacement. But there is no claim before me in this case that the Company has in any particular case failed to make a "reasonable" effort. The Union's claim is not for payment for such a failure but for stand-by status in all cases.

There is a sharp difference between the parties regarding the past practice in this respect. The Company maintains that it has for years adhered to the "unchanged practice" of having the Chief Engineer decide whether or not to request electricians to stand by after 5:00 p.m. It contends that in some instances electricians are not used at all, in some instances they are employed constantly, and in some

instances during a single voyage, they may be used on one day and not on other days when cargo is worked after 5:00 p.m. The Union contends, on the other hand, that "at all times when cargo was being worked, the past practice has been to have an electrician standing by and available." It does acknowledge exceptions in "those isolated situations when only a single winch was in operation and other winches were available in the event of a breakdown."

If the record before me established that the past practice was as definite as either the Company or the Union contend, this case would be easy to decide. But it is not that clear. Both sides rely more on a construction of various sections of the contract and their arguments are indeed ingenious if not persuasive. But there is no provision in the contract that says in so many words that electricians must or must not stand by in all cases when winches are being worked.

Nor was any evidence adduced showing that someone other than an electrician has ever worked on winches when they broke down. As noted above, the Company claims that it is entitled to use other than unlicensed personnel if it makes a "reasonable" effort to find a replacement. In the absence of such a case, there is no way of saying whether the efforts of the Company in a particular case are reasonable.

In my opinion, the burden under such circumstances would clearly be on the Company to show that its efforts were reasonable. Further, I believe that it would be proper in such a case to review whether the Company had rightfully decided not to have an electrician stand by. But I do not believe, in the absence of more compelling evidence of a clear past practice to have electricians stand by at all times, that I can rule that the contract requires continuous stand-

ing by while winches are being worked. But I am prepared in individual cases to rule on whether the Company has discharged the burden of proving the reasonableness both of its efforts to find a replacement and its decision not to have an electrician stand by in any case where someone other than an electrician has repaired a broken winch.

Dated: New York, N. Y., August 26, 1971.

THEODORE W. KHEEL
Arbitrator

* * *

(Acknowledged by Theodore K. Kheel, August 26, 1971.)

Exhibit D, Statement of Individual Crew Overtime, Annexed to Foregoing Affidavit.

(See opposite ☞)

EXHIBIT D
(Page 1)

AMERICAN EXPORT ISBRANDTSEN LINES, INC.

STATEMENT OF INDIVIDUAL CREW OVERTIME

Vessel Name: EXFORD — Voy. # 138
SUISSA, Jacob — Art. # 24
Rating: Electrician — Watch 0800-1200

DATE 1972	DAY	PLACE	DETAILED DESCRIPTION OF WORK PERFORMED	TIME FROM	TIME TO	(1) SAT. S.N. WATCHES SEA	(2) HOL. PORT	(3) ENTERING LEAVING	(4) CAPSD	(5) MAINT. REPAIR	(6) OTHER	(7) EARLY LATE EXTRA MEALS	(8) HOME PORT	OVERTIME AT MISC. RATES (9) HOURS	RATE	AMOUNT
9/25	Mon	Balto	FMH - not claimed on CW Rep gen'r. pump	1700	1800									1	2 86	
9/27	Wed	Sea	FMH - " renew brake coil	1700	1800									1		
9/29	Fri	Alb.	FMH - " Rep #8 winch	1700	1800									1		
10/16	Mon	Sea	Restore lights in galley	1900	2000					1						
10/23	Mon	"	" stbd eng. room	0810	0410					1						
11/19	Sun	Kitchi	Rep. stern light	1500	1600		1									
11/22	Wed	Bombay	Rep. #15 cargo winch	1830	1930					1						
11/28	Tue	"	Rep. # 18 cargo winch	1800	1900					1						
12/1	Fri	"	Tbl shooting called # 12 winch	0200	0300					1						
12/7	Thu	Sea	Rep. anch windlass	1800	2200					4						
12/16	Sat	Madras	Rep. anch windlass	0800	1200		4									
12/19	Tue	"	Rep. # 9 cargo winch	0020	0200					2						
12/19	Tue	"	" 8 "	0200	0300					1						
12/20	Wed	"	" #13 & # 8 "	0700	0800					1						
12/20	Wed	"	Renew brake resist #13 winch FMH	1200	1300					1				1		
12/21	Thu	Sea	Secure power on deck	1800	1900						1					
12/24	Sun	Calcutta	Rep. anch lights	1815	1900		1			MMH						
12/24	Sun	"	Power on deck, winches	2100	2200		1				POH					
12/26	Tue	"	Rep. refr. compressor	0500	0600					1						
12/30	Sat	Anch	Rep. & st by #20 winch	1310	1400		1									
12/16	Sat	Madras	Rep. # 13 & # 14 winch FMH	1300	1900		6							1		
					TOTAL HOURS		14			14	1			5		

INSTRUCTIONS: Enter on the top line of each column (1 to 8) the regular rate payable the particular employee for the respective category of overtime. No two rates should appear in any one column 1 to 8 inclusive. Column 9 should include all overtime paid at irregular rates. Each hour of overtime should be listed so that it can be applied under each classification of overtime.

	HOURS	RATE	AMOUNT
	5	2.86	
	20	7.43	
TOTALS			

CERTIFIED: K. M. Evans
DEPT. HEAD

APPROVED: B. Henriquez
MASTER

W
V. OFFICE

EXHIBIT D (Page 21)

AMERICAN EXPORT ISBRANDTSEN LINES, INC.

STATEMENT OF INDIVIDUAL CREW OVERTIME # 2

Vessel EXFORD Voy. # 138
Name SUISSA, Jacob Art. # 24
Rating Electrician Watch 0800-1700

DATE 1973	DAY	PLACE	DETAILED DESCRIPTION OF WORK PERFORMED	TIME FROM	TIME TO	(1) SAT. SUN. HOL. WATCHES SEA	(2) PORT	(3) ENTERING LEAVING	(4) CARGO	(5) MAINT. REPAIR	(6) OTHER	(7) EARLY LATE EXTRA MEALS	(8) HOME PORT	(9) OVERTIME AT MISC. RATES HOURS	RATE	AMOUNT
1/28	Sun	Sea	Restored power on deck, chipping hammer	1330	1430	1										
2/1	Thu	"	Called, repair galley grill	0630	0715					1						
2/1	Thu	"	Repair galley grill & oven	2000	2300					3						
2/9	Fri	"	Restore lights, crew mess	0700	0800					1						
2/16	Fri	"	"	0700	0800					1						
			TOTAL HOURS			1				6						

INSTRUCTIONS: Enter on the top line of each column (1 to 8) the regular rate payable the particular employee for the respective category of overtime. No two rates should appear in any one column 1 to 8 inclusive. Column 9 should include all overtime paid at irregular rates. Each hour of overtime should be listed so that it can be assigned under such classification of overtime.

	HOURS	RATE	AMOUNT
Sa/Su/Hol	5	2.86	14.30
15 at 7.43	37	7.43	274.91
TOTALS	42	var	289.21

CERTIFIED: R H Lasner
DEPT. HEAD

APPROVED:
MASTER

N. Y. OFFICE

Exhibit E, Statement of Individual Crew Overtime, Annexed to Foregoing Affidavit.

(See opposite ☞)

EXHIBIT E (Pages 1-4)

AMERICAN EXPORT ISBRANDTSEN LINES, INC.

STATEMENT OF INDIVIDUAL CREW OVERTIME #1

Vessel EXFORD Voy. # 130
Name SUISSA, Jacob Art. # 24
Rating Electrician Watch 0800-1700

DATE	DAY	PLACE	DISPUTED OVERTIME DETAILED DESCRIPTION OF WORK PERFORMED	TIME FROM	TIME TO	(1) SAT.-SUN.-HOL. MATCHES SEA	(2) SAT.-SUN.-HOL. MATCHES PORT	(3) ENTERING LEAVING	(4) CARGO	(5) MAINT. REPAIR	(6) OTHER	(7) EARLY LATE EXTRA MEALS	(8) HOME PORT	(9) OVERTIME AT MISC. RATES HOURS	RATE	AMOUNT
10/3	Tue	Bklyn	Cargo winch watch(Hereafter-CARGO)	1700	2000				3							
"	"	"	Secure power on deck(Hereafter-SECURE)	2000	2100					1						
10/5	Thu	Phila	Cargo	1700	2000				3							
"	"	"	Secure	2000	2100					1				ASHORE		
10/8	Sun	Norfolk	Power on	0700	0800		1									
10/8	"	"	Cargo	0800	1610		9									
"	"	"	Secure	2000	2100		1							ASHORE		
10/10	Mon	Sea	Hpp. lights lower E.R.	0445	0543					1						
10/16	Mon	"	Restore lights E.R.	0300	0400					1						
10/18	Wed	CVI	Power on	1730	1830						1					
11/6	Sat	Sea	Secure	0001	0100	1										
11/15	Wed	Karachi	Cargo	1900	2400				5							
11/16	Thu	"	"	0000	0245				3							
11/16	Thu	"	"	0730	0800				1							
11/16	"	"	"	1230	1330				1							
11/16	"	"	"	1900	2400				5							
11/17	Fri	"	" 0000-0300 1200-1300 1900-2400						9							
11/18	Sat	"	" 0000-0800 0800-1200 1200-2400				24									
11/19	Sun	"	" 0000-0600 0900-1315 1400-1500				11½									
11/21	Tue	Bombay	Power on	0600	0700						1					
11/21	Tue	"	Cargo	1800	2200				4							
11/21	Tue	"	Secure	2200	2300						1					
				TOTAL HOURS		1	46½		34	4	3					

INSTRUCTIONS: Enter on the top line of each column (1 to 8) the regular rate payable the particular employee for the respective category of overtime. No two rates should appear in any one column 1 to 8 inclusive. Column 9 should include all overtime paid at irregular rates. Each hour of overtime should be listed so that it can be applied under each classification of overtime.

	HOURS	RATE	AMOUNT
		2.86	
	87½	7.43	
TOTALS			

CERTIFIED: _____ DEPT. HEAD

APPROVED: _____ MASTER

_____ N. Y. OFFICE

FORM 1920-1 REV. 11-66

AMERICAN EXPORT ISBRANDTSEN LINES, INC.

STATEMENT OF INDIVIDUAL CREW OVERTIME

Vessel LXFORD Voy. # 138

Name SUISSA, Jacob Art. # 24

Rating Electrician Watch 0800-1700

DISPUTED OVERTIME SHEET #2

DATE	DAY	PLACE	DETAILED DESCRIPTION OF WORK PERFORMED	TIME FROM	TIME TO	(1) SAT.-SUN. HOL. WATCHES SEA	(2) SAT.-SUN. HOL. WATCHES PORT	(3) INTERVENING LEAVING	(4) CARGO	(5) MAINT. REPAIR	(6) OTHER	(7) EARLY LATE EXTRA MEALS	(8) HOME PORT	(9) OVERTIME AT MISC. RATES HOURS	RATE	AMOUNT
11/22	Wed	Bombay	Cargo	1930	2200				2½					ASHORE		
11/22	"	"	Secure	2200	2300						1					
11/23	Thu	"	Power on holiday	0800	0900		1									
11/23	Thu	"	Cargo "	0900	2200		13							ASHORE		
11/23	Thu	"	Secure "	2200	2300		1									
11/24	Fri	"	Cargo	1830	2200				3½					ASHORE		
11/24	Fri	"	Secure	2200	2300						1					
11/25	Sat	"	Power on	0830	0830		1									
11/25	Sat	"	Cargo	0930	2200		12½							ASHORE		
11/25	Sat	"	Secure	2200	2300		1									
11/26	Sun	"	Power on - cargo - secure	0830	2300		14½							ASHORE		
11/27	Mon	"	Cargo	1800	2400				6					ASHORE		
11/28	Tue	"	"	0000	0130				1½					ASHORE		
11/28	Tue	"	Power on	0700	0800						1					
11/28	Tue	"	Cargo	1800	1900				1							
11/28	Tue	"	"	1900	2400				5							
11/29	Wed	"	" Jumbo	1700	2300				6							
11/29	Wed	"	"	2300	2400						1					
11/30	Thu	"	Cargo	1800	2300				5							
12/2	Sat	"	C/E & 1st work on anch windlass	2100	2300		2							Golare		
12/3	Sun	"	" "	1800	2200		4							Golare		
12/15	Fri	Madras	Cargo	1200	1300				1							
			TOTAL HOURS				~~48~~ 49		31½		4					

INSTRUCTIONS: Enter on the top line of each column (1 to 8) the regular rate payable the particular employee for the respective category of overtime. No two rates should appear in any one column 1 to 8 inclusive. Column 9 should include all overtime paid at irregular rates. Each hour of overtime should be listed so that it can be applied under each classification of overtime.

	HOURS	RATE	AMOUNT
	84½	7.43	
TOTALS			

CERTIFIED: _____ DEPT. HEAD

APPROVED: _____ MASTER

_____ N. Y. OFFICE

P. T.

P&O Form 1388-1 REV 11-66

AMERICAN EXPORT ISBRANDTSEN LINES, INC.

STATEMENT OF INDIVIDUAL CREW OVERTIME

Vessel EXFORD Voy. # 138

Name SUISSA, Jacob Art. # 24

Rating Electrician Watch 0900-1700

DISPUTED OVERTIME # 3

DATE 1972	DAY	PLACE	DETAILED DESCRIPTION OF WORK PERFORMED	TIME FROM	TIME TO	(1) SAT. SUN. HOL. MATCHES SEA	(2) PORT	(3) ENTERING LEAVING	(4) CARGO	(5) MAINT. REPAIR	(6) OTHER	(7) EARLY LATE EXTRA MEALS	(8) HOME PORT	(9) OVERTIME AT MISC RATES HOURS	RATE	AMOUNT
12/15	Fri	Madras	Cargo	1700	2400				7							
12/16	Sat	"	"	0000	0800		8							W.O.A.C.		
12/16	Sat	"	"	1200	1300		1							Columbia		
12/16	Sat	"	"	1900	2400		5							W.O.A.C.		
12/17	Sun	"	"	0000	2400		24							W.O.A.C.		
12/18	Mon	"	"	0000	0800				8					W.O.A.C.		
12/18	Mon	"	"	1200	1300				1							
12/18	Mon	"	"	1700	2400				7					W.O.A.C.		
12/19	Tue	"	"	0800	0800				5							
12/19	Tue	"	"	1200	1300				1							
12/19	Tue	"	"	1700	2400				7							
12/20	Tue	"	"	0000	0700				7							
12/20	Wed	"	"	1700	2400				7					W.O.A.C.		
12/21	Thu	"	"	0000	0800				8					W.O.A.C.		
12/21	Thu	"	"	1200	1300				1							
12/21	Thu	"	Carry stores from EXCHESTER	1300	1400						1			Disputed		
12/24	Sun	Calcutta	Cargo	2200	2400		2									
12/25	Mon	"	" holiday	0000	0130		1½							W.O.A.C.		
12/25	Mon	"	1st A/E rep #3 aft cargo winch	0130	0230		1							W.O.A.C.		
12/25	Mon	"	Cargo	0230	0730		5							W.O.A.C.		
12/25	Mon	"	Breakdown #3 winch	0730	0830		1							W.O.A.C.		
12/25	Mon	"	Cargo	0830	2400		1½							W.O.A.C.		
			TOTAL HOURS				64		59		1					

INSTRUCTIONS: Enter on the top line of each column (1 to 8) the regular rate payable the particular employee for the respective category of overtime. No two rates should appear in any one column 1 to 8 inclusive. Column 9 should include all overtime paid at irregular rates. Each hour of overtime should be listed so that it can be applied under each classification of overtime.

	HOURS	RATE	AMOUNT
		2.86	
	124	7.43	
TOTALS			

CERTIFIED: _____ DEPT. HEAD

APPROVED: _____ MASTER _____ N.Y. OFFICE

FORM 1326-1 REV. 11-66

AMERICAN EXPORT ISBRANDTSEN LINES, INC.

STATEMENT OF INDIVIDUAL CREW OVERTIME

Vessel EXFORD Voy. # 138
Name SUISSA, Jacob Art. # 24
Rating Electrician Watch 0900-1700

INSURED OVERTIME Sheet # 4

DATE 1972	DAY	PLACE	DETAILED DESCRIPTION OF WORK PERFORMED			TIME FROM	TIME TO	SAT-SUN-HOL WATCHES SEA	SAT-SUN-HOL WATCHES PORT	ENTERING LEAVING	CARGO	MAINT REPAIR	OTHER	EARLY/LATE EXTRA MEALS	HOME PORT	OVERTIME AT MISC RATES HOURS	RATE	AMOUNT
12/26	Tue	Calcutta	Cargo			0000	0500				5							
"	"	"	"			0600	0800				2							
"	"	"	In lieu rest			0800	0900									Took rest 1 hours		
"	"	"	Cargo			1200	1300				1							
"	"	"	"			1700	2400				7							
12/27	Wed	"	"			0000	0800				8							
"	"	"	"			1200	1300				1							
"	"	"	"			1700	2400				7							Watch
12/28	Thu	"	"	0000-0800	1200-1300	1700	2400				16							Watch
12/29	Fri	"	"	0000-0800	1200-1300	1700	2400				16							Watch
12/30	Sat	"	"			0000	0330		3½									Watch
12/30	Sat	"	Secure			1500	1600		1									
12/30	Sat	"				1400	1500		1							Packing luggage from 1310-1400 - Mandatory overtime from 1400-1500		
							TOTAL HOURS		5½		63							

INSTRUCTIONS: Enter on the top line of each column (1 to 8) the regular rate payable the particular employee for the respective category of overtime. No two rates should appear in any one column 1 to 8 inclusive. Column 9 should include all overtime paid at irregular rates. Each hour of overtime should be listed so that it can be applied under each classification of overtime.

	HOURS	RATE	AMOUNT
		2.86	
	63½	743	
TOTALS			

CERTIFIED: _____ DEPT. HEAD

APPROVED: _____ MASTER

_____ N. Y. OFFICE

ORM 1320-1
REV. 11-66

Affidavit of Jacob Suissa, in Opposition to Motion.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JACOB SUISSA, being duly sworn, deposes and says:

That he is the plaintiff in the above entitled proceeding; and that he submits this affidavit in opposition to defendant's motion.

Plaintiff is a member of the National Maritime Union. He first joined defendant's vessel, the SS EXFORD, on May 22, 1972 as electrician. The chief engineer at that time was Mr. Nakamura. During that voyage (137), deponent was paid overtime for all hours during the time that cargo was being worked when this was outside his regular working hours. This was in full accordance with Article V, Section 25(d) of the Collective Bargaining Agreement:

> "An electrician is required to be aboard the vessel while it is in port and working cargo whether or not he is actually working, he shall receive overtime for all hours that he is to be aboard other than his regular hours."

There was never any question or dispute either with Mr. Nakamura or the company concerning this contractual overtime. The overtime sheets which are in the possession of the defendant will show these facts.

Deponent rejoined the vessel for foreign voyage 138 on October 3, 1972. The new chief engineer was Mr. Eisner. Mr. Eisner expressed hostility toward deponent from the very beginning of the voyage. However, when deponent joined the vessel and signed articles, he understood that the cargo watches were to be carried out in accordance with the Agreement as on the previous voyages. Nevertheless, approximately one week after we sailed, the chief informed deponent at sea that he would not honor said

overtime. Moreover, during the course of the voyage, he, and the first and second assistant engineers took away work that properly should have been carried out by the electicians. This again was in violation of the Agreement. See Article I, Section 36:

> "(a) JURISDICTION. It is agreed that work traditionally assigned and/or performed by Unlicensed Personnel shall not be performed by or assigned to any other persons provided Unlicensed Personnel are available and prepared to perform such work. The Company is obligated to make every reasonable effort to obtain replacements for any missing Unlicensed Personnel, when in a port where qualified seamen are available. Whenever such work is performed by persons other than Unlicensed Personnel (except under the circumstances provided above), such work shall be paid for at the applicable premium rate and such payment shall be divided among the Unlicensed Personnel ordinarily required to perform such work.
>
> (b) CUSTOMARY DUTIES. Members of all departments shall perform the customary and recognized duties of their respective department and rating. The above is not intended to restrict in any way or interfere with normal training of cadets aboard ship."

Deponent computed his overtime in the following manner:

1. Cargo time, 361½ hours at $7.43 per hour	$2705.95
2. Work usurped by chief and first and second assistant engineers (should have been given to electrician), 90 hours at $7.43 per hour	668.70

3. One hour penalty time at $2.74 per hour	2.74
4. One hour carrying stores from sister ship at $7.43 per hour	7.43
TOTAL	$3384.82

Items 3 and 4 are fully covered by the Agreement and, although of minor importance in the overall picture, serve to illustrate the gross indifference of the chief engineer to deponent's rights.

Your deponent, during the course of the voyage, did submit his complaints to the Union; and following his discharge from the vessel on February 13, 1973, did pursue the matter further.

Communications were had with secretary-treasurer Shannon J. Wall; and on March 1, 1973, the matter was referred to vice president Mel Baresic, in charge of contract enforcement.

Deponent takes sharp issues with defendant's contention that this issue of overtime was settled by it and the Union. That was never the case.

Deponent will further point out that defendant, by its port captain (denominated as "manager of operations"), one Captain Shivers, did offer an additional 15 hours at $7.43 an hour in order to settle my claim. This was over and above the alleged settlement of 86 hours overtime.

Your deponent, during the course of the processing of this complaint and claim, has always been mindful of the need to exhaust his Union remedies. After talking to Union vice president Peter Bocker in March, 1973, I was led to believe by Mr. Bocker that the Union could not assist me any further in obtaining my overtime, etc.; and that I was fully free to undertake this matter on my own. Thereafter,

Affidavit of Jacob Suissa.

I sent a letter to the Union on March 15, 1973 in which I stated:

> "Therefore, I want the record to show that all remedies have been exhausted under the Collective Bargaining Agreement (NMU) as to arbitration or any other out-of-court disposition of my claims. I am presently entitled to commence an independent lawsuit against American Export Isbrandtsen Lines, Inc."

The Collective Bargaining Agreement will also show that arbitration is not compulsory in the disposition of disputes under the Agreement.

The tactics employed by this defendant in originally removing the case from the Civil Court of the City of New York and engaging in the instant motion practice have severely prejudiced deponent's right to a prompt and speedy trial in the local Court. As a consequence, it is respectfully requested that this case be given a preference for trial since it involves a seaman's claim for wages.

s/ Jacob Suissa

Sworn to before me this
31st day of May, 1973.

Max Cohen
Notary Public, State of New York
No. 24-5744101
Qualified in Kings County
Term Expires March 30, 1974

Copy Received

Klein, Cohen +

Edelman Gerber WCG

11/1/74 2:00PM